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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.____

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,

Respondents.

No.____

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Denver and Rio Grande Western Railroad Company, a corporation, and Wilson McCarthy and

Henry Swan, Trustees of its property, respectfully shows:

Summary and Short Statement of Matter Involved

(Petitioners will be referred to as "the Railroad" and Respondents as "the City.")

The United States Circuit Court of Appeals, Tenth Circuit, has decided the question of Utah law which controls this case clearly contrary to applicable decisions by the Supreme Court of Utah in a case wherein, since the findings of fact by the trial court were based on substantial evidence, there is no dispute as to the facts involved. (R. 557.) In 1943, the Railroad, on account of greatly increased war traffic, was under the absolute necessity of rebuilding its switch yards in or near Provo City as expeditiously as possible. It had a clear choice to build them inside or outside the City limits but expressly stipulated to the City Commission that the yards would not be built in Provo City unless Ninth South Street, where it crossed the proposed yards, would be closed to all traffic. The City, in order to increase taxes and employment, urged and induced the Railroad to build inside the City and promised the Railroad that it would proceed forthwith to take the necessary steps to pass an ordinance closing the crossing. It also stated to the Railroad that it need not await the legal formalities but might proceed at once in reliance upon the promise of the Commission. Immediately after being thus assured, in April, 1943, the Railroad physically closed the crossing and proceeded to build the yards inside Provo City at a cost of $160,000.00, most of the benefit of which will be lost if the crossing should be opened. The City, although it realized the expected benefits, failed to keep its promise and in 1945 commenced trying to open the crossing. The District Court held the City estopped and enjoined it, because the Court concluded that the law of Utah, established in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, and reiterated in *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406, so required under these circumstances.

There is no difference as to the facts herein stated between the majority opinion written by Circuit Judge Bratton and concurred in by Circuit Judge Huxman and the dissenting opinion written by Circuit Judge Orie L. Phillips. The

findings of the trial court are supported by substantial evidence, are not clearly erroneous and are recognized by the majority and dissent as binding upon the Circuit Court of Appeals. Such Findings and evidence support the foregoing summary and short statement of the matter involved as will be demonstrated in the brief.

The whole difference between the majority and minority is based upon different conceptions as to the correct meaning of *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406 and *Hall* v. *North Ogden City*, ... Utah ..., 166 Pac. (2d) 221. (R. 557.) The majority treated these two cases as changing the Utah law as announced in the *Wall* case. The minority points out on the contrary that they do not have any such effect. That the minority is correct and the majority is incorrect will be clearly evident from a reading of the cases.

Jurisdictional Statement

(a) Jurisdiction to review this case by certiorari is sustained by Section 240 of the Judicial Code, 43 Stat. 938, Title 28 U. S. C. Section 347.

(b) The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was rendered on July 25, 1946. (R. 569.) No petition for rehearing was filed. This petition for writ of certiorari will be filed in this court prior to October 25, 1946.

(c) Jurisdiction in No. 3239, the civil suit, is based upon 28 U. S. C. Section 41, because the corporate plaintiff is a citizen of Delaware, plaintiffs Wilson McCarthy and Henry Swan are citizens of Colorado, Provo City is a Utah municipal corporation and the Mayor and Commissioners are citizens of Utah. The amount involved is in excess of $3,000.00, exclusive of interest and costs.

Jurisdiction in No. 3240 was exercised pursuant to a petition by the Trustees in bankruptcy authorized by an order of the District Judge of the United States District Court for the District of Colorado, In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor, in Proceedings

for the Reorganization of that Railroad. Copy of the order appears at R. 504.

Question Presented

The question presented is whether the majority opinion of the Tenth Circuit Court of Appeals correctly or incorrectly decided that the City should not be estopped and enjoined to claim that Ninth South Street, where it crosses the Railroad yards, was not validly closed. The District Court held that the City should be estopped and enjoined and senior Circuit Judge Phillips would have affirmed the District Court.

Reasons Relied on for Allowance of Writ

Under the Findings of the District Court, which are sustained by substantial evidence, are not clearly erroneous and are therefore binding upon the Circuit Court of Appeals, the sole question before the Circuit Court of Appeals was one of law: Should the City be estopped and enjoined from contending that the street was not properly closed and attempting to open it. This was a question to be determined according to Utah law. The Supreme Court of Utah in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, (1917) held under these circumstances that a city should be estopped. This principle of the *Wall* case was reiterated by the Supreme Court of Utah in *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406, in which the court recognized the doctrine of estoppel, raised the question as to whether applicable in the *Elkington* case but decided that the elements necessary for its application were not present. The majority opinion in the Tenth Circuit Court of Appeals misconstrued the *Elkington* case and considered that it changed the rule in the *Wall* case. The majority opinion also erroneously considered that the more recent case of *Hall* v. *North Ogden City*, ... Utah ....., 166 Pac. (2d) 221, impaired the authority of the *Wall* case. A reading of the three cases will clearly disclose that the *Wall* case stands unreversed and unimpaired as the law of the State of Utah.

WHEREFORE, your petitioners pray that a writ of certiorari be issued by this court to the United States Circuit

Court of Appeals, Tenth Circuit, to the end that the judgment of said court may be reviewed by this Honorable Court.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY and WILSON McCARTHY and HENRY SWAN,
Trustees of its property

By WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
1311 Walker Bank Building,
Salt Lake City, Utah.
Their Counsel

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of Court Below

The Findings of Fact, Conclusions of Law and Judgment in the plenary suit will be found at R. 18, 26 and 28. The Findings of Fact, Conclusions of Law and Judgment in the ancillary action will be found at R. 48 and 50.

A statement by the District Court in the nature of an opinion appears at R. 498-502. No opinion by the District Court is printed.

The majority and dissenting opinions of the Tenth Circuit Court of Appeals appear at R. 557 to 568 but such opinion is not yet reported.

Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked

The judgment of the United States Circuit Court of Appeals, Tenth Circuit, was rendered on July 25, 1946. (R. 569.) No petition for rehearing was filed. Petition to the Supreme Court of the United States for writ of certiorari was filed prior to October 25, 1946. The jurisdiction of the Supreme Court of the United States is invoked under

Section 240 of the Judicial Code, 43 Stat. 938, Title 28 U. S. C. Section 347.

Statement of the Case

The majority opinion gives a very meager statement of the case with only highly compendious statements as to the facts. It does, however, regard the findings of fact by the trial court as supported by substantial evidence, not clearly erroneous and as binding upon them. The majority opinion concedes that the negotiations between the Railroad and the City resulted in an oral agreement that the ordinance closing Ninth South would be passed. (R. 557, 560.) It does not, however, mention the finding of fact that the Mayor and City Commissioners not only promised to pass the ordinance closing the crossing but also affirmatively represented to the Railroad that it could proceed at once and need not await the legal formality of the passing of the ordinance. (R. 21.) Generally the majority opinion does not state the case in sufficient detail properly to present the elements of equitable estoppel upon which the trial court based its judgment and decree. Circuit Judge Phillips, on the other hand, in his dissenting opinion, makes a detailed statement of the case, with which the statements respecting the case in the majority opinion are consistent. Anticipating that a judicial statement of the case will authenticate itself far beyond a statement by counsel for petitioners, petitioners adopt Judge Phillips' statement of the case, merely adding references to the printed record.

Reference to the record herein thus: (R. 20 — 56-65) means that the Court's Finding of Fact appears at R. 20 and evidence supporting it at R. 56-65.

Circuit Judge Phillips stated the case as follows:

> "The findings of the trial court are supported by substantial evidence and are not clearly erroneous and, therefore, are binding on this court. The findings and undisputed evidence reflect these facts: In 1942, the Denver and Rio Grande Western Railroad Company[1]

[1]Hereinafter called the Railroad Company.

entered into negotiations with the mayor and commissioners of Provo City respecting the building of new railroad yards and the closing of Ninth South and Fifth East Streets in Provo. The negotiations continued into 1943. (R. 20 — 66, 70, 140, 167.)

"Throughout the years 1942 and 1943, Maurice Harding was mayor and J. P. McGuire and Joseph H. Swapp were the other two members of the city commission. In the fall of 1943, there was a municipal election to fill the office of mayor and the office of commissioner held by McGuire. Harding was reelected. McGuire failed of reelection, and Blake D. Palfreyman was elected in his place.

"During 1942 and 1943, freight traffic handled by the Railroad Company in its freight yards in Provo increased to such an extent that extensive railroad yards had to be constructed. (R. 20 — 56-65.) The agent of the Railroad Company at Provo explained the situation to the mayor and commissioners in July, 1942, and February, 1943. (R. 20 — 66, 70, 140, 167.) He advised the city officials that the Railroad Company could enlarge the existing yards within the corporate limits of Provo, but that it would require the closing of Ninth South Street and Fifth East Street; that as an alternative, the Railroad Company could build new yards outside of Provo. (R. 20 — 69, 140, 167.) The mayor and commissioners, in order to increase tax receipts and business and employment within the city, urged the Railroad Company to enlarge the existing yards within the city limits. (R. 20 — 70, 72, 140, 167, 260.)

"At a meeting of the city commissioners held on February 25, 1943, the mayor, the other commissioners, the city attorney, and representatives of the Railroad Company were present. (R. 71-73, 138, 139.) The agent of the Railroad Company told the city officials that the project would cost over $100,000, (R. 140), and exhibited to them a map of the proposed enlargement of the yards showing Ninth South Street and

Fifth East Street closed, and a cut-off street between Fifth East and Ninth South Streets. (R. 74.) The agent of the Railroad Company again told the city officials that if the yards were extended within the city, such streets would have to be closed. (R. 20 — 75, 140, 166, 167, 234, 407.) Thereupon, the mayor and commissioners agreed to enact an ordinance closing the streets. (R. 20 — 77, 78, 141, 168.) A statement was given to the press. (R. 78, 187, 190, 191.) A news item in the Provo Daily Herald issue of February 25, 1943, a newspaper of general circulation in Provo, described the project, stated that it would be necessary to close Ninth South Street, and described the cut-off road between Ninth South and Fifth East Streets. (R. 531.) The city officials and the Railroad Company representatives agreed that the Railroad Company attorney should prepare the necessary ordinance for the closing of the streets and send it to the city attorney of Provo. (R. 75, 77, 78, 142, 236, 377, 409.) On March 9, 1943, the attorney for the Railroad Company forwarded a form of ordinance to the city attorney. (Exhibit 28, R. 143-145, offered in evidence R. 144, Exhibit 29, R. 145, 146, offered in evidence R. 144.)

"On February 27, 1943, a group of approximately 200 citizens of Provo protested the closing of Fifth East and Ninth South Streets. (Ex. 64, R. 91.)

"The Railroad Company kept in touch with the mayor (R. 83) and repeatedly asked when the ordinance would be passed. (R. 83, 168.) The enlargement of the yards was imperative and the Railroad Company urged the city officials to proceed with the enactment of the ordinance in order that construction work could be commenced. (R. 21 — 168.) On April 7, 1943, Mayor Harding told the Railroad Company agent at Provo that the ordinance would be passed, the streets closed, and that the Railroad Company could go ahead immediately with the construction of the yards without waiting for the enactment of the ordinance. (R. 21 — 169, 254-258.) On April 9, the Provo Daily Herald published an article that Ninth South Street

was to be closed. (R. 90, 169, Exhibit 26, R. 533, offered in evidence R. 90.) The information did not come from the Railroad Company (R. 169) and must have come from Mayor Harding. The newspaper article stated, 'Closing of Ninth South street . . . will be ordered by the city commission in an ordinance to be adopted next week.' It then quoted Mayor Harding as follows: 'With numerous tracks to be constructed across the street, a dangerous hazard would result unless the road is closed.' (Exhibit 26, R. 533, offered in evidence R. 90.) On April 7, the agent at Provo telephoned to the Railroad Company's representative at Salt Lake City that the work could commence at once. (R. 83, 169.) On the same date, the Railroad Company superintendent directed the Division Engineer to proceed with the work. (Exhibit 25, R. 86, offered in evidence R. 86.)

"The Railroad Company relied on the promise of the mayor and city officials, and abandoned the alternative plan of building outside of Provo. Immediately after April 7, 1943, the Railroad Company secured an easement for (R. 96), and constructed (R. 96), the cutoff road 41.25 feet wide and approximately 700 feet long from Fifth East to Ninth South Streets. (R. 97.) The cut-off road was accepted as a public road and has been continually used as such and has been maintained by Provo. (R. 261, 416.) It is shown on the Provo map as a public street. (R. 261.) The Railroad Company secured the land necessary for the new yards, and construction of the yards was commenced on April 11, 1943, (R. 181) and continued until the fall of 1943. (R. 94, 95.) The Ninth South Street crossing was barricaded and closed to travel in May, 1943. (R. 182.) Eight new tracks were laid across Ninth South Street in June and July, 1943. (R. 183.) The Railroad Company expended for the improvements $160,000. (R. 21, 22 — 94-101.) The city officials (R. 258, 259, 383, 384, 412, 413, 416, 417) and the public (Exhibit 26, R. 90, offered in evidence R. 90, 533, R. 23 — 319, 342, 361, 366) knew of, and acquiesced in, the closing of the

streets. The city officials made no objection to the closing of the streets during 1943 and 1944. (R. 253.) No effort has ever been made to open Fifth East Street. (R. 23 — 168, 261.) In March, 1945, the city undertook to open that portion of Ninth South Street which had been closed. (R. 250, 251.)

"The city cooperated with the Railroad Company in the construction of the yards. The city built new water pipelines along Ninth South Street. The city changed its plans because of the projected railroad yard enlargement and put in an additional 6-inch cast-iron pipeline so that the city would not later have to tunnel under the tracks. (R. 287.) The additional pipeline was recommended by the city engineer to the mayor and commissioners in April, 1943. The engineer stated that the pipeline should be installed before the tracks were laid. (R. 287.) The Railroad Company left the new tracks open until the city had finished its trench for the pipeline. (R. 183.) At the request of the city, the Railroad Company did some of the city's work and was reimbursed for it. (R. 183, 184, 282.)

"The construction of the yards has resulted in an increase of tax revenue to Provo of approximately $2,400 per year. (R. 25 — 127, 260.)

"The opening of Ninth South Street across the railroad yards and tracks would make it necessary for trains and cuts of cars being switched or stored to be divided at the crossing (R. 23 — 103) and would slow down the handling of trains and cars in the yards. (R. 23 — 189.) It would reduce the usefulness and efficiency of the yards to the extent of 50 per cent (R. 23 — 104), and greatly increase the cost of operating the yards. (R. 23 — 103.) It would constitute a serious danger and hazard to the public traveling across such railroad yards and tracks. (R. 23 — 103-105, 187-190, 191-199.) The city has never offered to reimburse the Railroad Company or place it in status quo for the losses and damages that would result from the reopening of Ninth South Street. (R. 24.)

"When the agreement was reached for the closing of the streets, two conditions were imposed by the city, one, that the cut-off road would be built, and two, that the Railroad Company would reimburse the city for the cost of moving certain water and light lines. (R. 20, 21.) The city has never moved such lines. The Railroad Company has repeatedly advised the city of its willingness to pay the cost thereof. No other conditions were imposed." (R. 24, 25.)

Specification of Error

The United States Circuit Court of Appeals, Tenth Circuit, erred in holding that the Utah law was such that Provo City should not be estopped and enjoined under the facts of this case.

Argument

The sole question is as to the Utah law. If the law of Utah is as set forth in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, there can be no question that the facts as found by the court bring the case within that doctrine. What is the Utah law? Does the *Wall* case still correctly state the Utah law? Circuit Judge Phillips declares that it does. The learned trial judge who has practiced and presided in Utah since 1890 held that it does. Circuit Judges Bratton and Huxman held that under the Utah law the trial court erred in estopping and enjoining the City. Which of these judges is correct? A reading and understanding of three cases will determine that question:

Wall v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766

Tooele City v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406

Hall v. *North Ogden City*, ... Utah ....., 166 Pac. (2d) 221

In the *Wall* case plaintiff contended that Eighth South Street between Tenth East and Thirteenth East was only 66 feet in width and that the City should be restrained from digging a sewer excavation outside of such 66 foot limit. The

City contended that the street had been established 132 feet wide by original plats prior to 1871. Wall contended the City should be estopped because in 1891 the City approved a plat of Fremont Heights in which Eighth South Street was shown as only 66 feet in width. The city attempted to contend that its action in authorizing the approval of the Fremont Heights Addition was *ultra vires*, illegal and void but was estopped so to do.

The court stated the equities in the case as follows: in 1891 the question arose as to the width of the street; the City Council went upon the premises, inspected them and authorized the City Engineer to approve the plat; thereafter Wall's predecessor in interest deeded certain interests in lots for a nominal consideration; thereafter Wall loaned money on the security of a mortgage on the property in question which was thereafter foreclosed and the property bought by Wall; thereafter Wall sold and conveyed parts of the land in question by warranty deeds; improvements were made on the land in question and taxes levied and paid thereon.

The Court in the *Wall* case eliminated all questions, other than estoppel, and based its decision squarely upon estoppel. On page 596, the court said:

> * * * In our view the one question in this case which overshadows all others, and to which this opinion should be mainly directed, is whether or not the defendant city is estopped by reason of its own conduct from now claiming title to the property in question.

After referring to certain cases in which the doctrine of estoppel had not been applied to cities, the court on p. 601 distinguished them as follows:

> * * * None of them present a case like this, where the municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury. Indeed, it is hardly to be expected that many cases, if any at all,

can be found in the published reports similar to the case at bar. It will be found upon examination that many of the cases above cited place emphasis upon the fact that the municipality did not do anything affirmatively to mislead the party claiming the right to the ground in dispute.

The court in the *Wall* case approved the doctrine of equitable estoppel as stated by Judge Dillon in his work on Municipal Corporations—3 Dillon Municipal Corporations, 5th Edition, Section 119.

On page 604 the court said:

> * * * After discussing generally the doctrine of adverse possession and prescription as applied to public streets, Judge Dillon, in 3 Dillon, Mun. Corps. (5th Ed.) section 1194, says:
>
> "Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, are regarded as having in some respects, a double character, one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law

> unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

The Utah Court emphasized that the City had benefited from increased taxes and had made no offer to place Wall in *status quo*, both of which facts occur in the case at bar. Said the court on p. 606:

> In addition to this the defendant went on for years and years assessing this property against the plaintiff as private property. Its revenues were increased by hundreds of dollars by the sums exacted from the plaintiff on the assumption of the defendant that the property assessed belonged to her. As far as the record disclosed not even the slightest pretense of an offer has ever been made to place her in statu quo.

The court in the *Wall* case also quoted with approval the following excerpt from *City of Sullivan* v. *Tichenor*, 179 Ill. 97, 53 N. E. 561 (page 607):

> "A municipal corporation can no more profit by fraud upon property owners than an individual and may be estopped by conduct."

On page 607 the court said:

> We hold that this case falls within the exceptional class of cases referred to by Judge Dillon, and that it is the duty of the court to decide it as "right and justice require." It is our opinion that the city is estopped from claiming the premises in question as a public street.

There appears to be no question that if the principles of the *Wall* case are still the Utah law the judgment and decree of the District Court were correct. But the majority opinion reasons that its authority is impaired or reversed by the *Elkington* and *Hall* cases. A reading of the *Elkington* and *Hall* cases will disclose that they cannot be regarded as either reversing or impairing the authority of the *Wall* case. On the contrary, the *Elkington* case is a re-affirmation of the principle of the *Wall* case. On this subject Circuit Judge Phillips made the following statement:

> "It is my opinion that the Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 P. 2d 406, and Hall v. North Ogden City, ... Utah ..., 166 P. 2d 221, did not depart from the doctrine announced in the Wall Case.
>
> "In the Elkington Case, the court, after reciting the facts in the Wall Case, said:
>
> > 'In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property has been assessed against the defendants or their predecessor in interest; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners.
> >
> > 'Balancing the justices of the cause, we find there is no ground for an estoppel in pais as against the city.'
>
> "If the fact that an ordinance vacating the street had not been enacted was in itself a sufficient answer to Elkington's claim, why did the court refer to the Wall Case, distinguish it on the facts, and expressly hold there was ground for an estoppel in pais?" (R. 567.)

A reading of the *Hall* case will disclose that the language therefrom quoted by the majority opinion on page 4 is purely

obiter dictum. Circuit Judge Phillips disposed of it summarily and accurately as follows:

> "In the Hall Case, Hall and others asserted claim to the streets by adverse possession. No claim of estoppel was asserted or decided. It was held that under the Territorial Townsite Act, under which the city claimed, the plaintiffs were prohibited from acquiring title by adverse use." (R. 567.)

The *Hall* case arose under the United States and Utah Township Acts. The Utah statute, Compiled Laws of Utah, 1876, Sec. 1174 (set forth in Appendix A), used most emphatic prohibitory language against any impairment of the public title. The statute reads in part:

> (The title) * * * shall vest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whatsoever.

The court sharply distinguishes between a case under the Township Act and one not under it. The Township Act is not applicable in the case at bar. Even in the presence of the emphatic prohibitory language of the Township Act, the court studiously avoided negativing the possibility of equitable estoppel being applicable in a proper case although under that statute. The court placed great emphasis on the circumstance in the *Hall* case that the fee was owned by the city, not the abutter. In the case at bar the fee is owned by the Railroad and, upon the closing of the street, that fee is free and clear of the easement. The court so found and concluded. (R. 25, 26.) Such was the uncontradicted evidence. (R. 157, 158.) Both the majority and minority opinions in the *Hall* case disclose the absence in that case of the elements essential in order to apply equitable estoppel against a municipal corporation in regard to public streets, (affirmative misrepresentations, reliance thereon and great hardship) which elements were present in the *Wall* case and so abundantly involved in the case at bar.

An accurate reading and understanding of the *Elkington* and *Hall* cases will fully confirm the analysis of them made by Judge Phillips. Far from overruling the *Wall* case, neither

of them even expresses a dictum or a suggestion that the *Wall* case was incorrectly decided. The *Hall* case doesn't even mention the *Wall* case.

On page 5 the majority opinion declares that the principle of the *Wall* case is to be applied only "where the city acted within the ambit of its legal authority but in an irregular way." That is precisely the situation in the case at bar. The City was within the ambit of its authority. The City had the power under Section 15-8-8 U. C. A. 1943 (See Appendix A for text) to close this crossing. It agreed informally to pass an ordinance closing it. It had that power. It failed to take the formal action of passing an ordinance. In all of the cases applying the estoppel doctrine there has been some legal irregularity. Otherwise the question of equitable estoppel is never reached. Thus in the *Wall* case the City contended that its action in approving the plat was ultra vires, illegal and void. See page 596.

In the *Wall* case the City had express statutory power to vacate the street by ordinance. Compiled Laws of Utah 1888, Vol. 1, Section 340. (See Appendix A for text.) Section 373 of the same statute provided that all powers granted, including the power to vacate streets, might be executed by ordinance. (See Appendix A for text.) The *Wall* and *Provo City* cases are identical in these particulars. In both of them the city had statutory power to vacate streets with the proviso that the city might do so by ordinance. In neither case did the city follow its statutory authority formally and technically. In the *Wall* case the vacation of the street occurred by approval of a plat which was inconsistent with the street being opened. In the *Provo City* case the city agreed to pass an ordinance. No difference in principle between the two cases is perceived.

On page 5 the majority opinion states that the principle of the *Wall* case does not apply where the Mayor and City Commissioners merely agreed verbally to pass an ordinance closing the street. It also gives considerable weight to the circumstances that the Railroad knew that an ordinance was the formality prescribed by the law and that it had not been passed. Informality and failure to act with technical legal exactness are always present in cases where the doctrine of

the *Wall* case is applied to municipal corporations. The doctrine of equitable estoppel is not reached unless the City has failed to function according to legally prescribed and formal methods. The doctrine is applicable in spite of the fact that the City has not followed prescribed legal and formal procedures. The *Wall* case may be searched from beginning to end and no such limitation as suggested by the majority opinion is to be found therein.

Cases applying the doctrine announced by Judge Dillon and relied on by the Supreme Court of Utah in the *Wall* case involve various informalities in failing to follow prescribed legal methods with knowledge on the part of the citizen that the law has not been followed.

One of the principal cases relied on by the *Wall* case, *Los Angeles* v. *Cohn*, 101 Cal. 373, 35 Pac. 1002, expressly stated that the agreement upon which equitable estoppel may be based might be in parol made by the City officials informally. Los Angeles brought an action to recover a tract of land at the intersection of Spring and Main Streets, which was covered by portion of building known as "Temple Block," claiming that the land in question was part of a public street. Before the building was commenced a controversy arose as to whether part of it was on the public street. The City Attorney reviewed the matter and reported that Temple was justified in erecting the building on the ground in question. Thereupon the building was completed and nothing was done until the commencement of the present action. On page 1004 the court said:

> If the city had expressly agreed by its officers, with defendants' grantors, *even in parol*, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong;

> and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street. (Italics added.)

The Supreme Court of the United States in *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, 60 L. Ed. 301, 36 S. Ct. 102, approved the doctrine announced by Dillon in a case where the Telegraph Co. knew formal official action was necessary and that only informal action, if any, had been taken.

The Telegraph Company made written application for a right of way for telegraph poles and lines. The record of the selectmen disclosed no official action but shortly thereafter the lines were constructed and maintained for many years. Thereafter the Telegraph Company needed to make repairs and replacements and asked for an official license. This was refused and a threat was made to prevent future operation of the lines. The court held that the town was estopped.

In *City of St. Joseph* v. *St. Joseph Terminal R. Co.*, 268 Mo. 47, 186 S. W. 1080, St. Joseph induced the railroad to build its terminal inside city limits. To this end it passed ordinances vacating some streets but not all that were to be covered by the terminal. The Railway built the terminal over certain streets which were not so vacated. Later a private individual bought property abutting on one of these streets and attempted to open the street. Even though official action by ordinance was the legally prescribed method of vacating streets and the railroad knew it and there was none such, the city was held to be equitably estopped.

In each of the following cases the estoppel was based on informal conduct of the City officials and the citizens knew of the informality.

People v. *City of Rock Island*, 215 Ill. 488, 74 N. E. 437

Baldwin v. *Trimble*, 85 Md. 396, 37 Atl. 176

Boise City v. *Wilkinson*, 16 Idaho 150, 102 Pac. 148

Rohrbaugh, Mayor v. *Mokler*, 26 Wyo. 514, 188 Pac. 448

Portland v. *Inman Poulsen Lumber Co.*, 66 Ore. 86, 133 Pac. 829

Paine Lumber Co. v. *City of Oshkosh*, 89 Wis. 449, 61 N. W. 1108

Reuter v. *Lawe*, 94 Wis. 300, 68 N. W. 955

People v. *Wieboldt*, 233 Ill. 572, 84 N. E. 646.

The majority opinion also gives considerable emphasis to the suggestion that the application of equitable estoppel deprives the citizens of Provo of the remedy of referendum. The Utah referendum statute in Section 25-10-21 U. C. A. 1943, (See Appendix A for text) provides that legal voters "may initiate any desired legislation and cause the same to be submitted to the law making body—." An ordinance to open a crossing would certainly seem to be well within the very comprehensive language used.

But in any event it must be clear that a municipality cannot avoid the estoppel resulting from the acts and conduct of its Commission by pointing to the referendum statute and contending that they are thereby deprived of their right to resort to the referendum statute. The reasoning of the majority opinion in this particular would eliminate the settled law of Utah, announced by the *Wall* and *Elkington* cases, that municipalities may be equitably estopped under certain circumstances.

The reasoning of the majority opinion would make it seem that the citizens of Provo were anxious to avoid the closing of Ninth South Street but are frustrated in that desire by the doctrine of equitable estoppel. This is based upon a petition in March 1943, signed by some 200 citizens protesting the closing of the crossing. This assumes that no more diligence is required by citizens to protect their rights than merely to file a petition with the City Commission even though thereafter they slumber soundly on their rights. There was a public announcement that the protest was disregarded by the City. The Mayor of Provo told the press on April 7, 1943, that the street would be closed and the enlargement of the yards would proceed. (Exhibit 26, R. 533, offered in evidence R. 90.) During the two or three months thereafter the streets actually

were closed and the yards constructed. If the citizens of Provo were so vitally interested in the matter, then was the time for them to move effectively by injunction, by "initiating" an ordinance to prevent the street closing under the referendum statute or other appropriate procedure. Instead, they were content to protest and remain silent when their protest was ignored.

The Supreme Court of Utah has held that this is not sufficient diligence. *Lewis* v. *Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558. The Bank entrance encroached on a public street so that it partially obscured the show windows on either side thereof. The owners on either side protested but did nothing more during the construction of the building. The court held that it was not enough to protest but that affirmative steps should have been taken to prevent the purpresture. The court on page 48 said:

> So here. If the plaintiff desired to prevent the erection of the bank front as planned, and as all others who were interested with him understood it was planned, and as he must have known it was planned and was being constructed, why did he not bring an action, as was done in the Tyson Case, which he now cites and relies on? Had he done that, the courts would undoubtedly have prevented the defendant from proceeding to erect the front as proposed by it. * * * Under those circumstances we think the plaintiff should be limited to his legal remedy, namely, the recovery of such an amount of damages as the usable value of his building may be depreciated by reason of the construction of the bank front as it now is.

Conclusion

The Majority Decision of the Circuit Court of Appeals, Tenth Circuit, has misconceived the Utah law as announced in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766. The District Court, which would have been affirmed by Senior Circuit Judge Phillips, correctly held and adjudicated that under the facts in this case, Provo City should have been estopped and enjoined. The judgment and decree of the District

Court should have been affirmed. Failure so to do is inconsistent with the doctrine of:

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860

Prudence Realization Corporation v. *Geist*, 316 U. S. 89, 86 L. Ed. 1293, 62 S. Ct. 978

Corn Exchange Nat'l Bank & Trust Co. v. *Klauder*, 318 U. S. 434, 87 L. Ed. 884, 63 S. Ct. 679.

Respectfully submitted,

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APPENDIX A

Text of Various Utah Statutes

Compiled Laws of Utah 1876, Sec. 1174 reads as follows:

> That whenever the title to such lands shall be held by the corporate authorities of any town or city, all lands designated for public use by such corporate authorities as streets, lanes, avenues, alleys, parks, commons and public grounds, shall vest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whatsoever; and the judge of probate who shall have entered any lands in trust for any town or city which may afterwards become incorporated, shall, under the same conditions, convey by deed to the corporation thereof the lands designated for the use of the public as aforesaid; that in the case of death or disability of the judge of probate or mayor who may have entered the lands in trust for any town or city under the law of Congress, as aforesaid, before the complete execution of such trust, the same shall vest in his successor in office, who shall proceed with the execution of the same in the same manner, and under the same conditions imposed by this act upon the judge or mayor receiving the trust in the first instance.

Section 15-8-8 Utah Code Annotated 1943 reads as follows:

> They (the Board of Commissioners) may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, and may vacate the same or parts thereof, by ordinance.

Section 340, Compiled Laws of Utah 1888, Vol. 1, reads as follows:

> To exclusively control, regulate, repair, amend and clear the streets, alleys, bridges, sidewalks or cross-

walks; and open, widen, straighten or vacate streets and alleys, and put drains or ditches and sewers therein; and prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury.

Section 373, Compiled Laws of Utah 1888, Vol. 1, reads as follows:

> The city council shall have exclusive authority and power to establish and regulate the police of the city; to impose fines, forfeitures and penalties for the breach of any ordinance; to provide for the recovery of such fines and forfeitures and the enforcement of such penalties, and to pass, make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or the laws of this Territory, as they may deem necessary for carrying into effect and execution the powers specified in this act, and for the peace, good order, regulation, convenience and cleanliness of the city, for the protection of property therein from destruction by fire or otherwise, and for the health, safety and happiness of the inhabitants thereof.

Section 25-10-21 Utah Code Annotated 1943 reads as follows:

> Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect.